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No. 89-1494

In The
Supreme Court of the United States
October Term, 1989

RALPH J. ZOLA,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL BRIEF AND APPENDIX

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, petitioner wishes to bring to the Court's attention a decision of the Interstate Commerce Commission, *M. Bulifant Trucking, Inc.—Investigation and Revocation of Certificates:* MC-C-30160 (1989), 1990 Fed. Carriers Cases Par. 37,783 at p. 47,071, which was published, and of which petitioner first became aware, after the submission to this Court of his petition for a writ of certiorari. The case is set forth in the Supplemental Appendix annexed hereto.

In *M. Bulifant Trucking, Inc., supra,* the Commission relied, as the basis for sanction powers over non-licensees, upon the decision for which petitioner seeks a writ of certiorari. (SA 12 n. 5, and SA 15, n. 7)[1]

Accordingly, the *M. Bulifant Trucking, Inc.* decision indicates that the issue raised by petitioner is a recurring one, i.e., the Commission is now taking the position that it has sanction authority over non-licensees, even though Congress has specifically revoked such sanction power previously contained in Sec. 42 of the Interstate Commerce Act.

Respectfully submitted,

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1. References to Supplemental Appendix are preceded by "SA".

[¶ 37,783] M. Bulifant Trucking, Inc.—Investigation and Revocation of Certificates; No. MC-C-30160.

By the Commission; December 15, 1989.

.01 Introductory Facts.—In a decision served June 10, 1986, in No. MC-C-10969, *Federal Highway Administration, Department of Transportation v. M. Bulifant Trucking, Inc.* (not printed), this Commission found that M. Bulifant Trucking, Inc. (Bulifant) had persistently and intentionally violated the Federal Motor Carrier Safety Regulations (FMCSR). We noted violations relating to: (1) driver qualifications (49 CFR Part 391); (2) hours of service (49 CFR Part 395); and (3) inspection, repair, and maintenance of vehicles (49 CFR Part 396). Accordingly, we ordered Bulifant to cease and desist, and thereafter refrain and abstain, from violating the FMCSR. We suspended its operating authority for 30 days, effective July 25, 1986, and indicated an intent to revoke its operating rights if its pattern of willful noncompliance continued.

Subsequently, a safety compliance review of Bulifant conducted by the Department of Transportation (DOT) and an investigation by our Office of Compliance and Consumer Assistance (OCCA) uncovered evidence that gave us reason to believe that Bulifant might be violating the cease and desist order and that it might have transported regulated commodities in interstate commerce while its authority was suspended. Accordingly, in a decision served May 1, 1989, we instituted this proceeding to determine whether Bulifant's operating authority should be suspended or revoked

for willful failure to comply with our prior decision. In view of Joseph Bulifant's and Walton J. Bulifant's management of the carrier, we also indicated that we would consider whether the public safety required us to find them unfit to hold additional operating authority. We directed OCCA to participate in the proceeding, and we invited DOT to intervene as a party. OCCA, DOT, and respondents have filed verified statements.

.02 Background.—Joseph Bulifant and his brother Walton P. Bulifant acquired ownership of Bulifant from their father in 1970. At the time, Bulifant held four certificates collectively authorizing the transportation of paper and paper products, scrap metals, lead and zinc products, and several other specified commodities, from, to, and between various points in the Northeast. On January 25, 1971, the Commission issued Bulifant a certificate in No. MC-42156 embracing all of its operating rights and superseding its previously issued certificates. Joseph and Walton P. Bulifant apparently managed Bulifant's operations until 1979, when Walton P. Bulifant became ill. Joseph's son, Walton J. Bulifant, began participating in the carrier's management, and Walton P. Bulifant's involvement gradually lessened.

In January 1981, DOT conducted a safety compliance review of Bulifant, during which it interviewed Joseph Bulifant and Walton J. Bulifant.[1] DOT discovered significant

[1] At that time, Joseph Bullfant was the carrier's vice president and Walton J. Bullfant was the office manager.

violations of safety regulations concerning driver qualifications, drivers' hours of service, and vehicle inspection and maintenance reports. DOT gave the carrier an unsatisfactory safety rating as a result of the compliance review. On June 24, 1982, the Commission issued Bulifant a certificate in No. MC-42156 (Sub-No. 7), authorizing the transportation of general commodities (except classes A and B explosives, household goods, and commodities in bulk), between points in Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, and the District of Columbia.

In October 1983, DOT conducted another compliance review of Bulifant. DOT again interviewed Joseph Bulifant and Walton J. Bulifant and also interviewed Walton P. Bulifant.[3] In this audit, DOT discovered significant violations concerning driver qualifications, accident reporting, and hours of service. DOT issued a Notice of Claim, and Bulifant paid a $6,000 fine.

DOT again audited Bulifant's operations in December 1984. During this audit, it again interviewed Joseph, Walton J., and Walton P. Bulifant. In this audit, DOT discovered 54 violations of driver qualifications regulations, 1 violation of accident reporting requirements, 1,018 violations of hours of service regulations, and 183 violations of vehicle inspection and maintenance

[3] At this time, Walton J. Bulifant was general manager, Walton P. Bulifant was president, and Joseph remained vice president.

report requirements. The investigation report for this audit stated, "It is quite evident that the subject has not taken seriously the importance of and the danger to the public of noncompliance with the Federal Motor Carrier Safety Regulations." As a result of its findings and its previous experiences with Bulifant, DOT filed a complaint with this Commission on May 16, 1985. The complaint proceeding resulted in the June 10, 1986, cease and desist and suspension order cited above.

In addition to their involvement with this carrier, Joseph Bulifant and Walton P. Bulifant had formed Walton Leasing Co., Inc. (Walton Leasing) sometime before 1986. That company's initial function was to acquire and own tractors and semitrailers and to lease them to Bulifant. When Joseph Bulifant learned of the Commission-ordered suspension of Bulifant's operating authority, he worked out an agreement with a motor carrier named Megonegal's for Trucks, Inc. (Megonegal's). Under the agreement, Megonegal's was to lease equipment from Walton Leasing and serve Bulifant's customers as of July 25, 1986, the effective date of the suspension. Walton P. Bulifant signed the lease agreement on behalf of Walton Leasing. The agreement provided for no compensation to be paid to Walton Leasing. Under the agreement's terms, Walton Leasing would furnish fuel, oil, and maintenance for the leased vehicles and would provide all insurance coverage relating to transportation in the vehicles.

The agreement stated that the leased equipment would be in the exclusive control and possession of Megonegal's. OCCA's investigation disclosed, however, that Bulifant controlled the operations under the lease agreement.

Between July 25 and August 22, 1986, G. B. Goldman Paper Co., of Philadelphia, PA, tendered Bulifant 309 individual shipments of paper for movement to points in the Northeast. The shipments were transported in interstate commerce as 149 truckload shipments, for which Bulifant collected $82,269.58 in gross revenues.[3] Bulifant's tariff rates were used in rating the shipments. The freight bills were prepared on forms normally used by Bulifant. Checks in payment of the freight charges were made payable to Bulifant and were deposited in Bulifant's account.

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[3] OCCA's exhibit of representative shipments handled during the suspension also shows one shipment moved from New York, NY, to Marlboro, NJ, for Baldwin Paper Co.

At the time of these shipments, Megonegal's only operating authority was contract carrier authority limiting the carrier to transportation under continuing contracts with property brokers. None of the above shipments moved pursuant to such contracts. Effective July 28, 1986, the insurance coverage for Megonegal's on record with the Commission was being provided by the same insurance company, and under the same policy number, as that on record for Bulifant.

At the time of Bulifant's suspension, Walton Leasing also held no authority from this Commission. It was not until April 8, 1988, that Walton Leasing was issued authority.[4]

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[4] Certificate No. MC-166631 (Sub-No. 1-C) and Permit No. MC-166631 (Sub-No. 1-P) provided for transportation of general commodities (except classes A and B explosives, household goods, and commodities in bulk): (1) as a common carrier, between those points in the United States in and east of Minnesota, Iowa, Missouri, Arkansas, and Louisiana; and (2) as a contract carrier, between points in the United States (except Alaska and Hawaii), under continuing contracts with commercial shippers or receivers of such commodities.

On April 21, 1988, DOT conducted another safety review and interviewed Joseph Bulifant, a driver, and a dispatcher. Joseph Bulifant had taken over Bulifant's operations upon the death of Walton P. Bulifant in 1987 and was active in Bulifant's daily operations. Walton J. Bulifant had begun managing the operations of Walton Leasing. In this compliance review, DOT discovered 29 violations of driver qualification regulations and 106 violations of hours of service regulations. As a result of its findings, DOT issued a Notice of Claim against Bulifant for $13,000 on June 2, 1988. It closed its case without collecting a fine, however, based on representations that Bulifant had gone out of business.

On January 10, 1989, the Connecticut Department of Motor Vehicles (DMV) conducted a road inspection of a tractor-trailer unit registered to Bulifant. That inspection revealed a number of safety violations, including brakes that required adjustment and faulty brake lights. The DMV placed the tractor and trailer out of service. On March 22, 1989, the Connecticut DMV again conducted a road inspection of a tractor-trailer combination registered to Bulifant. The DMV found, however, that Bulifant was being operated as Walton Leasing. This DMV inspection also uncovered numerous safety violations, including problems relating to brakes and lights. As a result, the DMV placed the tractor-trailer unit out of service.

On April 17, 1989, DOT audited Walton Leasing. DOT interviewed Joseph Bulifant and a dispatcher/driver. DOT did not interview Walton J. Bulifant, although its inspection report characterized him as active in the day-to-day operations of the carrier. The audit revealed 18 violations of regulations concerning driver qualifications, 210 relating to drivers' hours of service, and 125 concerning vehicle inspection and maintenance reports. In addition, DOT found that Walton Leasing did not have a driver safety training/orientation program or a safety incentive/award program and that management did not review safety compliance status on a periodic basis. DOT found, also, that the carrier could not define a reportable accident or the fatal accident notification requirements and had no policy for taking action against drivers involved in preventable accidents. DOT noted, further, that Walton Leasing had no procedures concerning drivers' use of alcohol and drugs. The review points out that Walton J. Bulifant and Joseph D. Bulifant were both active in day-to-day operations, and determines that, "M. Bulifant allegedly went bankrupt 5/88 and resurfaced as Walton Leasing Co., Inc., with the same principals." DOT issued a Notice of Claim against Walton Leasing for $8,000 on May 2, 1989.

.03 **Discussion and Conclusions.**—In our decision served June 10, 1986, we ordered Bulifant to cease and desist from violating the FMCSR, and we suspended its operating authority for 30 days. We issued that decision pursuant to our enforcement powers under 49 U. S. C. 11701. Pursuant to the

provisions of 49 U. S. C. 10925(c)(1), the Commission may revoke a motor carrier's certificate or permit if the carrier willfully fails to comply with an order issued under section 11701. Willfulness can be found if a person "(1) intentionally does an act which is prohibited—irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *Lawrence v. Commodity Futures Trading Com'n*, 759 F.2d 767, 773 (9th Cir. 1985).

Because of the substantial threat of continued unsafe operations and the important public policy considerations involved in ensuring safe motor carrier operations, we will revoke the carriers' authorities and issue a cease and desist order against the involved individuals.

There is no question that Bulifant willfully violated the Commission's suspension order. Whereas Bulifant's principals attempted to make it appear that a friendly motor carrier, Megonegal's, was serving Bulifant's customers during the suspension, it is clear that Megonegal's played little or no role in the service actually provided. The agreement was merely an attempt to cover up the fact that Bulifant equipment was used and Bulifant was paid directly for the transportation. The lease was a sham. Joseph Bulifant, being highly experienced in regulated interstate transportation, certainly should have known that the scheme involving Megonegal's, Walton Leasing, and Bulifant violated the suspension order. Joseph Bulifant's fears that Bulifant would lose customers and go out of business as a result of the order hardly excuse the evasive

actions. Joseph Bulifant had many years' experience in the transportation industry. It is difficult to accept as mitigation his statements that he was not familiar with Megonegal's authority, what service it actually performed, or why Bulifant did the billing, or that Bulifant had no intent to violate the law. Even if unintentional, the Bulifant-Megonegal's relationship was carried out with indifference to legal requirements. See *Lawrence, supra*; and *Schreiber—Invest. of Opers. & Revoc. of Certifs.*, 125 M. C. C. 532, 564 (1976), and cases cited therein. In the circumstances, revocation of Bulifant's operating authority is warranted.

A second, separate ground for revocation exists. As noted, we ordered Bulifant to cease and desist from violating the FMCSR. As OCCA points out, DOT compliance reviews in 1981, 1983, and 1984 had disclosed persistent violations by Bulifant of regulations relating to drivers' qualifications, drivers' hours of service, and vehicle inspection and maintenance reports. In reporting on its 1984 compliance review, DOT stated that Bulifant had "not taken seriously the importance of and the danger to the public of noncompliance" with the FMCSR. The April 1988 compliance review of Bulifant (resulting in a $13,000 Notice of Claim), and the April 1989 compliance review of Walton Leasing, reveal continued noncompliance in the same basic areas.

Respondents attempt to minimize the severity of the violations by characterizing them as mere violations of recordkeeping requirements. This argument ignores the system by which DOT ensures safety compliance. DOT does not routinely ex-

amine trucks and drivers; the carrier is responsible for making those examinations and keeping records of them. DOT then *checks the records* to ensure that the trucks and drivers are safe and qualified for operation. See *DOT v. ICC*, 733 F. 2d 105, 111 (D. C. Cir. 1984). Moreover, this argument ignores the equipment-related defects and the Connecticut DMV actions.

Respondents' suggestion that DOT and the Commission are nitpicking is not well taken. In review after review of Bulifant, and now its successor Walton Leasing, DOT has discovered serious violations warranting severe enforcement actions. "[P]ersistence in violations over a period of time, despite admonitions and enforcement penalties, justifies characterizing the conduct under consideration as willful." *Schreiber, supra,* at page 564, and cases cited therein. On this record, we are unwilling to accept at face value Joseph Bulifant's claim that he now intends to comply with the law.

Merely revoking Bulifant's authority would be ineffective since its operations are now being conducted by Walton Leasing. Under the circumstances, the record before us also supports revocation of Walton Leasing's operating authority. "[T]he law is well settled that the 'corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute.'" *Brudn's*

Freezer Meats v. United States Dept. of Agr., 438 F. 2d 1332, 1343 (8th Cir. 1971). See also *Sebastopol Meat Company v. Secretary of Agriculture*, 440 F. 2d 983, 985 (9th Cir. 1971), ("there are many cases that stand for the general principle that the mere form of a business organization is insufficient to shield the practices sought to be prohibited from the reach of a federal regulatory agency.") See also *Electric Bond & Share Co. v. SEC*, 303 U. S. 419, 440 (1938); and *FTC v. Standard Education Society*, 302 U. S. 112, 119 (1937). Compare also *Mattes v. United States*, 721 F. 2d 1125 (7th Cir. 1983), in which, at page 1131, the court approved agency action "to prevent manipulation of corporate structures to circumvent suspension orders." In enacting provisions permitting the Commission to revoke operating authority, Congress could not have intended to deprive the Commission of the power to make its revocation decisions effective. In light of the clear evidence that Bulifant is now Walton Leasing, the latter's authority must also be revoked. This result was clearly contemplated by our order initiating this proceeding, where we specifically noted that Walton was under common control with Bulifant and had participated in operations during the period of suspension.[8]

[8] Our authority to exercise ancillary powers in order to give effect to our orders was recently reconfirmed in *Zola v. Interstate Commerce Commission*, No. 89-3499 (U. S. C. A., 3d Cir., November 16, 1989). There the court specifically approved the revocation of a carrier's authority where the carrier had been found to be the successor of a carrier whose authority had been previously revoked and both were controlled by the same individual. A prior order against the second carrier was not necessary. *Id.*, slip op. at 21-22.

Joseph Bulifant contends that the transfer of motor carrier operations from Bulifant to Walton Leasing was occasioned by legitimate business concerns. OCCA argues that Bulifant's principals were merely attempting to free themselves of the cloud that had long covered Bulifant's operations. In any event, as to the safety issues of primary concern to us, we see little to distinguish the Walton Leasing enterprise from the Bulifant enterprise that preceded it. Walton J. Bulifant had been managing Bulifant's operations until Joseph Bulifant took over approximately 1 year before the April 1988 compliance review of Bulifant that resulted in the issuance of a Notice of Claim. Thereafter, Walton J. Bulifant managed Walton Leasing's operations until Joseph Bulifant took over shortly after the April 1989 compliance review of Walton Leasing that also resulted in the issuance of a Notice of Claim.* Joseph Bulifant was at least nominally responsible for Bulifant's day-to-day operations in the 1980's, and he would be responsible for those of Walton Leasing in the future. Significantly, Walton Leasing appears to be using the same motor vehicle equipment and a number of the same drivers that Bulifant had been using.

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* Notwithstanding Joseph Bulifant's claim that the poor showing in the April 1989 audit was caused by a loss of Walton Leasing's records due to a fire, compliance reviews had disclosed that neither Bulifant nor Walton Leasing was: (1) routinely inspecting and maintaining motor vehicles; (2) ensuring that drivers met applicable qualification standards; or (3) ensuring that drivers observed hours of service regulations.

Respondents have made no showing that Walton Leasing's operations are or will be any different from those of Bulifant. We would have expected, at the very least, a definitive program for assuring future compliance. What we find is little more than a plan to continue the Bulifant operation in a different corporate form. In the circumstances, to make the revocation of Bulifant's authority effective, we must also revoke the operating authority of Walton Leasing.

Finally, in view of the responsibility of Joseph Bulifant and Walton J. Bulifant for the management of Bulifant and Walton Leasing, OCCA asks that the Commission enter a cease and desist order against them to prevent their future participation in for-hire transportation activities within the Commission's jurisdiction. Although the statute does not specifically authorize the entry of a cease and desist order against noncarrier individuals, the Commission is not limited to specific statutory authorizations in formulating responses to evils and abuses in the transportation industry. The statute expressly provides that "[e]numeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." 49 U. S. C. 10321(a). See, *e. g., ICC v.*

American Trucking Associations, 467 U. S. 354, 365 (1984) (Commission's authority extended beyond the specific provisions of the statute to those actions that further statutory mandate); and *Trans Alaska Pipeline Cases*, 436 U. S. 631, 655 (1978) (Commission has powers "adjunct" to enumerated powers). See also *United States v. Chesapeake & Ohio R. Co.*, 426 U. S. 500, 513-514 (1976), in which the court held that, acting under its implied powers, the Commission can formulate orders that are tailored to the particular circumstances. Implied powers may properly be invoked not merely to punish transgressors but also to protect the integrity of the agency's processes. See *Amoskeag Co. v. ICC*, 590 F. 2d 388, 392-393 (5th Cir. 1979); and see also *Greater Boston Television Corporation v. FCC*, 463 F. 2d 268, 291 (D. C. Cir), *cert. denied*, 406 U. S. 950 (1972).

Here, issuing a cease and desist order against Joseph Bulifant and Walton J. Bulifant is adjunct to our enumerated powers and is necessary to further a specific statutory mandate—the revocation of authority.[1]

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[1] The Commission's power to bar individuals from engaging in specific transportation activities was recently affirmed in *Zola, supra*, slip op. at 24-26.

Both Joseph Bulifant and his son Walton J. Bulifant were active in managing Bulifant and Walton Leasing and were responsible for the persistent violations of the FMCSR. It is well-settled that a command to a corporation is, in effect, a command to those who are officially responsible for the conduct of its affairs. "If they . . . prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience . . . " *Wilson v. United States,* 221 U. S. 361, 377 (1911). Were we not to bar Joseph Bulifant and his son from participation in the regulated transportation industry, they could form a new corporation as they did with Walton Leasing, or purchase the stock of an existing carrier, and resume operations. The integrity of our orders would be compromised, and, perhaps more importantly, based on these individuals' past actions, the public safety could be threatened. The entry of cease and desist orders directed against the individuals responsible for the management, direction, and control of the activities of a corporation is proper when it appears that an order limited in its application only to the corporation would prove futile. *Sebastopol, supra,* at page 985.

Joseph Bulifant states that he has fired his son and that he will comply with regulation in the future. Here, however, persistent, inexcusable past unlawful conduct, coupled with the lack of a definitive program for ensuring future compliance, undercuts a belief that future compliance can realistically be anticipated.

The landmark decision in *Gilbertville Trucking Co. v. United States*, 371 U. S. 115, 130 (1962), recognized the authority of agencies to impose drastic remedies to expunge violations, subject only to the limitation that action be taken "with as little injury as possible to the interests of private parties or the general public." The Supreme Court recognized the importance of allowing the agency to choose the remedy and "to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives . . . ." *Id.* See also *Querner Truck Lines, Inc.—Investigation*, 100 M. C. C. 215, 220 (1965). When faced with a carrier or carriers that consistently have demonstrated an inability or unwillingness to comply with the law, and when we have no real basis for assuming future compliance, drastic action is warranted. See *Machinery Haulers Association*, 5 I. C. C. 2d 808, 812 (1989). This is particularly so where, as here, the public safety is implicated.[8]

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[8] We believe that the Bulifants should be barred from engaging in any regulated transportation, not just the specific business in which they were previously engaged, since safety violations can occur in any phase of transportation. Compare *Zola, supra*, slip op. at 26-27.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The authority held by M. Bulifant Trucking, Inc., in Certificates No. MC-42156, issued January 25, 1971, and No. MC-42156 (Sub-No. 7), issued June 24, 1982, and by Walton Leasing Co., Inc., in Certificate No. MC-166631 (Sub-No. 1-C) and Permit No. MC-166631 (Sub-No. 1-P), both issued April 8, 1988, is revoked, effective January 22, 1990.

2. Joseph D. Bulifant and Walton J. Bulifant shall, on or before January 22, 1990 cease and desist, and thereafter refrain and abstain from, directly or indirectly engaging in any transportation activities within the Commission's jurisdiction until further order of the Commission.

3. Joseph D. Bulifant and Walton J. Bulifant must comply with the provisions of 49 CFR 1119.1 by informing the Commission by affidavit of their compliance with this decision by January 22, 1990.

4. This proceeding is discontinued.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Lamboley, Phillips, and Emmett.